

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,

Petitioner,

v.

DDC TECHNOLOGY, LLC,

Patent Owner.

IPR2023-00707

U.S. Patent 9,420,075

PATENT OWNER'S OPPOSITION TO MOTION TO EXCLUDE

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Patent Owner (“PO”) respectfully submits this opposition to Petitioner’s motion to exclude. For the reasons set forth below, Petitioner’s request that Exhibits 2017; 2020; 2033 ¶¶10, 12, 13, and 15; 2037; and 2047 be excluded should be denied. Likewise, Petitioner’s request that passages of PO’s Patent Owner Preliminary Response (“POPR”) and its Surreply in support of the POPR (“Surreply”) discussing this material be excluded should also be denied.

I. PO’s Reliance on Exhibits 2017 and 2020 Does Not Violate the Parties’ Mediation Agreement or FRE 408; They Should Not be Excluded

PO’s use of Exhibits 2017 and 2020 did not violate FRE 408. The protections of Rule 408 preclude only “the use of settlement negotiations ‘to prove or disprove the validity or amount of a disputed claim.’” *eBay Inc. & Paypal, Inc., Petitioner, v. Purple Leaf, LLC, Pat. Owner.*, No. CBM2015-00052, Paper 22 at 11, 2015 WL 13846150, at *7-8 (P.T.A.B. July 30, 2015) (quoting Fed. R. Evid. 408). Settlement-related evidence is admissible before the Board for other purposes. *Id.* Because DDC relied on these materials to address RPI/privity issues, rather than the validity or amount of a disputed claim, Rule 408 is inapplicable. Petitioner’s attempt to force the RPI issue into FRE 408 by arguing that it “affects the validity of the proceeding” falls short. In *eBay*, the Board addressed a very similar issue—whether a party could rely on settlement communications to show that it had standing to file a petition for covered business method review. Thus, the issue potentially affected the proceeding in a similar manner as here. Yet the Board

found that Rule 408 did not preclude consideration of the relevant information because it did not prove or disprove the validity of the petitioner's patentability challenges, citing cases in which courts had reached the same result. *See eBay*, Paper 22 at 11-12, 2015 WL 13846150, at *7-8.

Petitioner's assertion that Exhibits 2017 and 2020 violate a mediation agreement is wrong. As Petitioner's motion notes, the parties' mediation agreement included a statement regarding "the confidentiality of all verbal and written communications with the dispute resolution process." While that agreement referenced the Texas Alternative Dispute Procedures Act ("TADPA"), it did so only with respect to confidentiality. (Patent Owner complied with the parties' mediation agreement by filing the relevant materials under seal.) The mediation agreement made no reference to the separate provisions of the TADPA relating to non-use in judicial or administrative proceedings that Petitioner attempts to invoke. The parties never agreed to incorporate the non-use provisions of the TADPA into their mediation agreement.

Moreover, even if the parties had incorporated the non-use provisions of the TADPA into their mediation agreement, those provisions go on to indicate that the non-use provisions do not apply if "[a]n oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable independent of the procedure." Tex. Civ. Prac. and Rem. Code

Ann. Section 154.073(c). The Federal Rules of Evidence apply to proceedings before the Patent Trial and Appeal Board. *See* 37 C.F.R. § 42.62(a). As discussed above, FRE 408 allows the admission of information exchanged as part of a settlement communication so long as the purpose is not to prove or disprove the validity or amount of a disputed claim.¹

Petitioner’s argument based on the TADPA is also inappropriate because Petitioner “expressly removed the allegedly offending information used by DDC in its POPRs from the scope of the mediation agreement in emails on July 24, 2023.” *See* Ex. 2069 at 9, Dkt. 167, *DDC Technology, LLC v. Google LLC*, No. 3:23-cv-01160-VC (N.D. Cal.) (redacted public filing); Ex. 2068. Having done so, Petitioner cannot fairly ask the Board to exclude it from this proceeding.

Finally, Petitioner cites no authority for the proposition that even if PO had breached the mediation agreement (which it did not), that such breach would justify striking relevant evidence. In fact, the Board has held that it “will not be pressed upon to enforce” district court confidentiality provisions. *See Skechers U.S.A., Inc. v. Nike, Inc.*, No. IPR2017-00620, 2017 WL 4277684, at *2 (P.T.A.B.

¹ Petitioner also references Section 154.053. However, that section is titled, “Standards and Duties of Impartial Third Parties” (e.g., mediators). Because it is directed primarily to impartial third parties, it is not relevant to Petitioner’s argument and, in any case, does not override the provision of Section 154.073(c).

Sept. 25, 2017); *see also ROHM Semiconductor USA, LLC v. MaxPower Semiconductor, Inc.*, No. IPR2020-01674, 2021 WL 1433266, at *6 (P.T.A.B. Apr. 15, 2021) (holding that the Board “do[es] not have jurisdiction to resolve contract disputes”). Thus, even if a breach could be shown, it would not provide a basis for striking relevant evidence.

For the same reasons, the following portions of PO’s POPR and Surreply should not be excluded: (1) POPR, p. 11, l. 6 – p. 12, l. 5; (2) POPR, footnote 3; and (3) Surreply, p. 4, ll. 5-8.

II. Exhibit 2033

A. Paragraphs 10 & 15 are Not Hearsay

Paragraphs 10 and 15 of Exhibit 2033 do not contain hearsay testifying to statements by any third-party individual; rather, they contain testimony by Mr. Buckley based on his personal knowledge. *See* EX2033, ¶38 (“I declare that all statements made herein of my own knowledge are true.”).² Mr. Buckley also identified how he came to have this personal knowledge: “My understanding of the foregoing information in this declaration is based upon my decade-plus experience

² While Mr. Buckley also indicated that statements made on information and belief were believed to be true, the statements in Paragraphs 10 and 15 were not identified as being made on information and belief.

running a business that manufactured and sold mobile phone accessories,” referring to DODOcase. *Id.*, ¶¶ 38, 2.

Specifically, it was within Mr. Buckley’s personal knowledge, gained through running DODOcase, that (1) MerchSource inquired about a patent license (EX2033, ¶10); and (2) later sought to renegotiate or terminate its agreement with DODOcase (*Id.*, ¶15). These observations by Mr. Buckley based on his personal knowledge do not constitute hearsay. *See, e.g., Tratree v. BP Pipelines (North America) Inc.*, No. H-03-954, 2009 US Dist. LEXIS 43426, at *9 (S.D. Tex. May 22, 2009) (“The Court has reviewed Moore’s affidavit and disagrees with Plaintiff’s assertion that the affidavit is conclusory and contains hearsay. Moore is simply stating facts that are within her personal knowledge as the Corsicana, Texas Branch Manager and that are based upon her review of Tratree’s resume.”); *Madison One Holdings, LLC v. Punch Int’l, NV*, No. 4:06-cv-3560, 2009 U.S. Dist. LEXIS 27406, at *32-33 (S.D. Tex. Mar. 31, 2009) (“Krueze’s statement that ‘[he] consistently heard from customers that they wanted GM to develop new products’ is based on the personal knowledge that he obtained visiting GM customers in the Netherlands, France, Germany, Belgium, and Italy in 2002. The Court does not consider this statement hearsay, but, rather, a conclusion based on Krueze’s personal observations and impressions in 2002”; distinguishing such statements made from personal knowledge with statements reporting declarations by other

individuals); *Garcia v. Moorehead Communs., Inc.*, 2013 U.S. Dist. LEXIS 116810, at *15 (N.D. Ind. Aug. 19, 2013) (“Notably, the Court will also consider the portions of the Plaintiffs’ declarations which concern observations or conclusions made on personal knowledge which would not constitute hearsay”; distinguishing such statements from those that described purported declarations by other individuals).³

For the same reasons, the following passages of the POPR should not be excluded: (1) POPR, p. 30, ll. 8-10 (citing EX2033, ¶10); and (2) POPR, p. 31, ll. 12-14 (citing EX2033, ¶15).

B. PO’s Reliance on Paragraphs 12 & 13 Does Not Violate FRE 408

PO’s reliance on Paragraphs 12 and 13 of Exhibit 2033 does not violate FRE 408. Petitioner’s only argument for their exclusion is that these paragraphs include statements made during compromise negotiations. As discussed above, Rule 408 only precludes “the use of settlement negotiations ‘to prove or disprove the validity

³ Petitioner asserts that the Board found that Paragraph 15 constituted hearsay in the Institution Decision. However, in Footnote 24, the passage cited by Petitioner, the Board described the statement by Mr. Gromfin, MerchSource’s President, in Paragraph 16 of Exhibit 2033. Paragraph 15 includes no statement by Mr. Gromfin, and instead states only that “[i]n the Summer of 2017, MerchSource sought to renegotiate or terminate the Master License Agreement with DODOcase.”

or amount of a disputed claim.’’ See *eBay*, No. CBM2015-00052, 2015 WL 13846150, at *7-8 (P.T.A.B. July 30, 2015). As Petitioner acknowledges, PO relied on these exhibits in support of its argument that MerchSource is an RPI of Google. They were not used to prove or disprove the validity or amount of a disputed claim. Thus, Rule 408 does not prohibit PO’s reliance on them.

For the same reasons, the following portion of PO’s POPR should not be excluded: POPR, p. 30, l.12 – p. 31, l. 10.

III. PO’s Reliance on Exhibits 2037 and 2047 Does Not Violate FRE 408, so They Should Not be Excluded

PO’s reliance on Exhibits 2037 and 2047 does not violate FRE 408.

Petitioner’s only argument for their exclusion is that they contain emails with statements made during compromise negotiations. As discussed above, Rule 408 only precludes “the use of settlement negotiations ‘to prove or disprove the validity or amount of a disputed claim.’” See *eBay*, No. CBM2015-00052, 2015 WL 13846150, at *7-8 (P.T.A.B. July 30, 2015). As Petitioner acknowledges, PO relied on these exhibits in support of its argument that MerchSource is an RPI of Google. They were not used to prove or disprove the validity or amount of a disputed claim. Thus, Rule 408 does not prohibit PO’s reliance on them.

For the same reasons, the following portion of PO’s POPR and Surreply should not be excluded: (1) POPR, p. 23, 2nd full paragraph; (2) POPR, p. 30, l. 12

– p. 31, l. 10; (3) POPR, p. 37, l. 19 – p. 38, l. 5; and (4) Surreply, p. 5, 1st full paragraph.

Dated: July 24, 2024

Respectfully submitted,

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Patent Owner's Exhibit List

<u>Exhibit Number</u>	<u>Description</u>
2001	Google's Reply in Support of its Motion to Stay Pending Determination of <i>Inter Partes</i> Review of the Patents-in-Suit Case No. 3:23-cv-01160, N.D. Cal., filed April 27, 2023, ECF 160
2002	Email dated June 5, 2023 from Michael Kiklis to Matt Holohan regarding Discovery
2003	Complaint for Patent Infringement Case No. 3:22-cv-01263, N.D. Tex., filed June 10, 2022, ECF 1
2004	First Amended Complaint for Patent Infringement Case No. 3:22-cv-01263, N.D. Tex., filed January 30, 2023, lodged publicly February 2, 2023, ECF 123
2005	HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY GOOG-DDC-0000040-GOOG-DDC-0000046 (See Paper 14 for additional description)
2006	HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY GOOG-DDC-0000029-GOOG-DDC-0000039 (See Paper 14 for additional description)
2007	HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY GOOG-DDC-0000024-GOOG-DDC-0000026 (See Paper 14 for additional description)
2008	HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY OPS000010-OPS000024 (See Paper 14 for additional description)

<u>Exhibit Number</u>	<u>Description</u>
2009	Google Inbound Services Agreement, last modified April 13, 2023, captured on June 22, 2023, from https://support.google.com/legal/answer/10039636?sjid=14045947512057405231-NA
2010	Google ISA and Reference Version History, captured on June 22, 2023, from https://support.google.com/legal/answer/10071677?hl=en#zippy=%2Cinbound-services-agreement-isa-archive
2011	Working with Alphabet/Google, captured on June 22, 2023, from https://support.google.com/corporate-suppliers/answer/9844770?hl=en&ref_topic=9902269#a&b&c&d&e&f&g
2012	Google Supplier Purchase Order Terms and Conditions, April 2023, captured on June 22, 2023, from https://support.google.com/corporate-suppliers/answer/9844474?hl=en&ref_topic=9902369&sjid=14045947512057405231-NA&visit_id=638230555166029102-814262976&rd=1
2013	Defendant Google LLC's Motion to Transfer Venue to the Northern District of California Under 28 U.S.C. § 1404(a) and to Sever Its Case, Together with Supporting Brief Case No. 3:22-cv-01263, N.D. Tex., filed November 10, 2022, ECF 94
2014	Defendant Landsberg Orora's Motion to Dismiss and Supporting Brief Case No. 3:22-cv-01263, N.D. Tex., filed September 13, 2022, ECF 68

<u>Exhibit Number</u>	<u>Description</u>
2015	HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY OPS000009, OPS000046, and OPS000056-OPS000060 (See Paper 14 for additional description)
2016	Memorandum Opinion and Order Case No. 3:22-cv-01263, N.D. Tex., filed March 14, 2023, ECF 139
2017	CONFIDENTIAL Haller Declaration
2018	Plaintiff DDC Technology, LLC’s Response in Opposition to Defendant’s Motion to Stay Lawsuit Pending Patent Office’s <i>Inter Partes</i> Review Case No. 3:22-cv-01263, N.D. Tex., filed June 7, 2023, ECF 145
2019	CONFIDENTIAL – ATTORNEYS’ EYES ONLY – PROTECTIVE ORDER MATERIAL OPS000009, OPS000046, and OPS000056-OPS000060 (See Paper 14 for additional description)
2020	ATTORNEYS EYES ONLY Email string (See Paper 14 for additional description)
2021	Capacitive vs. Resistive Touchscreens: What Are the Differences?, captured on July 12, 2023, from https://www.makeuseof.com/tag/differences- capacitive-resistive-touchscreens-si/
2022	Scheduling Order Case No. 3:22-cv-01263, N.D. Tex., filed December 20, 2022, ECF 106

<u>Exhibit Number</u>	<u>Description</u>
2023	Complaint for Patent Infringement against Mattel, Inc. Case No. 1:21-cv-01781, D. Del., filed December 21, 2021, ECF 1
2024	HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY DDC_010437-DDC_010446 (See Paper 14 for additional description)
2025	Google and Mattel partner to bring back the View- Master as a VR headset, captured on June 22, 2023, from https://www.theverge.com/2015/2/13/8033179/mattel-view-master-google-cardboard-vr
2026	Google Partners With Mattel to Bring VR to the Iconic View-Master captured on June 22, 2023, from https://www.wired.com/2015/02/google-mattel/
2027	Mattel’s View-Master gets a Google VR makeover captured on June 22, 2023, from https://www.cnet.com/tech/computing/google-mattel-announce-a-virtual-reality-view-master/
2028	Complaint for Declaratory Judgment and Injunctive Relief against MerchSource, LLC, et al. Case No. 3:17-cv-07088, N.D. Cal., filed December 13, 2017, ECF 1
2029	Petition for <i>Inter Partes</i> Review IPR2018-00494, U.S. Patent 9,420,075, filed January 15, 2018, Paper 2 DDC_003868-DDC_003949

<u>Exhibit Number</u>	<u>Description</u>
2030	Petition for Post Grant Review PGR2018-00020, U.S. Patent 9,811,184, filed January 15, 2018, Paper 2 DDC_007993-DDC_008071
2031	CONFIDENTIAL DDC_010483-DDC_010487 (See Paper 14 for additional description)
2032	CONFIDENTIAL DDC_010488-DDC_010492 (See Paper 14 for additional description)
2033	Buckley Declaration
2034	CONFIDENTIAL DDC_010511-DDC_010515 (See Paper 14 for additional description)
2035	Email from October 13, 2014 from Nartker to Buckley, Dalton, Zabarauskas, Rayford, Subject: New Cardboard Partnership Leads DDC_018503
2036	DODOcase Kickstarter Campaign identifying VR Viewers as “Patent Pending” DDC_018341-DDC_018356
2037	CONFIDENTIAL DDC_010613-DDC_010617 (See Paper 14 for additional description)
2038	MerchSource, LLC, et al Notice of Subpoena to Google, Inc. Case No. 3:17-cv-07088, N.D. Cal., served April 27, 2018

<u>Exhibit Number</u>	<u>Description</u>
2039	Defendant Google LLC's Supplemental Objections and Responses to Plaintiff DDC Technology, LLC's First Set of Interrogatories to Defendant Google LLC (No. 1) Case No. 3:22-cv-01263, N.D. Tex., served January 6, 2023
2040	Complaint for Patent Infringement against Unofficial Cardboard, Inc. Case No. 1:21-cv-05596, N.D. Ill., filed October 21, 2021, ECF 1
2041	HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY DDC_010418-DDC_010436 (See Paper 14 for additional description)
2042	HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY GOOG-DDC-0000365 (See Paper 14 for additional description)
2043	Email on August 27, 2015 from Google (WWGC) to DODOcase (Dalton), Subject: WWGC V2 Manufacturers Guide Available Now Including two documents from zip attachment titled "wwgc_manufacturers_kit_v2.0.zip": "WWGC Guidelines and Best Practices.pdf" version 2.0, dated August 17, 2015; and "WWGC Viewer Profile and Badge Guidelines.pdf" version 1.0, dated April 16, 2015

<u>Exhibit Number</u>	<u>Description</u>
2044	Google Form for “Google Cardboard Manufacturers” to “Apply[] to the WWGC program” captured on June 22, 2023, from https://support.google.com/cardboard/manufacturers/contact/general
2045	Google Terms of Service, effective January 5, 2022, captured on June 22, 2023, from https://www.gstatic.com/policies/terms/pdf/20220105/it7r24p9/google_terms_of_service_en_us.pdf (the static pdf version of the Terms of Service available at https://policies.google.com/terms?hl=en)
2046	Market share of mobile phone touch screens worldwide from 2013 to 2020, by technology, captured on July 12, 2023, from https://www.statista.com/statistics/616468/mobile-phone-touch-technology-share-worldwide/
2047	CONFIDENTIAL Email string (See Paper 14 for additional description)
2048	Google Android Compatibility Definition Android 7.0, downloaded on July 21, 2023, from https://source.android.com/static/docs/compatibility/7.0/android-7.0-cdd.pdf
2049	Intentionally omitted
2050	Declaration of Bob Mackey
2051	Excerpts from the Oxford Dictionary of Mechanical Engineering (2013)
2052	Excerpts from The American Heritage Dictionary of the English Language, New College Edition (1981)
2053	Deposition Transcript of Kurtis Keller

<u>Exhibit Number</u>	<u>Description</u>
2054	Second Declaration of Patrick Buckley
2055	Google Analytics “Ecommerce Overview” report
2056	Google Analytics “Product Coupon” report
2057	Article titled, “1 Million Cardboard Headsets Shipped, Google Says,” obtained from the following URL: https://web.archive.org/web/20221210082644/https://www.roadtovr.com/1-million-cardboard-headsets-shipped-google-says/
2058	Article titled, “Google Ships Five Million Cardboard Virtual Reality Devices,” obtained from the following URL: https://www.reuters.com/article/us-alphabet-cardboard-idUSKCN0V5297/
2059	Article titled, “Google has Shipped Over 10 Million Cardboard VR Headsets,” obtained from the following URL: https://www.theverge.com/2017/2/28/14767902/google-cardboard-10-million-shipped-vr-ar-apps
2060	Video clip sent by Patrick Buckley to Google employees on July 25, 2014, in the email chain included as EX2034 in IPR2023-00707 & IPR2023-00708 and as EX2024 in IPR2023-00709 & IPR2023-00711
2061	A second video clip sent by Patrick Buckley to Google employees on July 25, 2014, in the email chain included as EX2034 in IPR2023-00707 & IPR2023-00708 and as EX2024 in IPR2023-00709 & IPR2023-00711
2062	Google Cardboard (I/O 2015) Technical Specification v.2.0
2063	Google Cardboard Best Practices – Version 3.0 (2020)
2064	Durovis Dive 5 web page identifying compatible phones, available at https://www.durovis.com/en/product.html?id=1#compatible
2065	Spreadsheet providing information regarding phones compatible with the Durovis Dive 5
2066	An article titled, “Google Partners with Mattel to Bring VR to the Iconic View-Master,” available at https://www.wired.com/2015/02/google-mattel/
2067	Screenshots from a video available at https://youtu.be/bJ0OCUqbwZM?si=_7WxKZW8oRIp0n11&t=176

<u>Exhibit Number</u>	<u>Description</u>
2068	Declaration of Cortney S. Alexander
2069	Dkt. 167, <i>DDC Technology, LLC v. Google LLC</i> , No. 3:23-cv-01160-VC

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and 42.105(a) and (b), I certify that on the date indicated below, a true and accurate copy of the foregoing document was served on the following counsel for Petitioner via e-mail, pursuant to Petitioner's consent to e-mail service:

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